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Final report

Working Group on the obligation to extradite or prosecute (*aut dedere aut judicare*)

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A. Introduction

1. At its 3189th meeting, on 31 July 2013, the Commission took note of the report of the Working Group[1] (hereinafter referred to as "the 2013 report of the Working Group").[2] The purpose of this final report is to summarize the conclusions and recommendations of the Working Group on the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)".

2. At the present session, the Commission reconstituted the Working Group on the obligation to extradite or prosecute (*aut dedere aut judicare*) under the chairmanship of Mr. Kriangsak Kittichaisaree. The Working Group met on 6 May and 4 June 2014. It was mindful of the priority that the General Assembly continued to give to this topic over the years, as evidenced most recently in General Assembly resolution 68/112 entitled "Report of the International Law Commission on the work of its sixty-third and sixty-fifth sessions", operative paragraph 7, which reads:

> "*Invites* the International Law Commission to continue to give priority to the topics 'Immunity of State officials from foreign criminal jurisdiction' and 'The obligation to extradite or prosecute (*aut dedere aut judicare*)'."[3]

3. The Working Group considered several options for the Commission in deciding how to proceed with its remaining work on the topic. In this regard, most members of the Working Group noted that the delegations to the Sixth Committee in 2013 were divided in

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[1] *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10* (A/68/10), para. 149.

[2] *Ibid.*, Annex A. At the meeting of the Sixth Committee of the General Assembly on 4 November 2013, the Chairman of the International Law Commission introduced the topic "The obligation to extradite or prosecute" as follows:

> "... The report of the Working Group is intended to summarize and highlight particular aspects of the work of the Commission on this topic.
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> The report conceptualizes the topic by placing it within the broader framework of the efforts to combat impunity, while respecting the rule of law. It also recalls the importance of the obligation in the work of the Commission, summarizes the work done thus far, and offers suggestions that might be useful for States parties to conventions containing the obligation.
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> The report addresses issues relevant to the topic against the background of the Secretariat Survey (2010) and the Judgment of 20 July 2012 of the International Court of Justice in *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*. In doing so, the Working Group did not consider it necessary to delve further into the question of customary international law.
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> ..."

[3] General Assembly resolution 68/112 of 16 December 2013. This operative paragraph is identical to operative paragraph 8 of General Assembly resolution 67/92 of 14 December 2012.

General Assembly resolution 66/98 of 9 December 2011 stipulates:

> "*Invites* the International Law Commission to continue to give priority to, and work towards the conclusion of, the topics 'Immunity of State officials from foreign criminal jurisdiction' and 'The obligation to extradite or prosecute (*aut dedere aut judicare*)'".

As a result of the informal consultations held on 6 and 7 November 2012, the wording ", and work towards the conclusion of," was dropped from the operative paragraph in the resolution for the year 2012 in order to defer to the International Law Commission's decision on how to proceed with these two topics, without prejudice to the Sixth Committee's position on this operative paragraph in the following years. The resolution for the year 2013 merely followed the wording of the operative paragraph in the resolution of the preceding year.

their views of how the Commission should approach future work on the topic. Some delegations emphasized the continued relevance of the topic in the prevention of impunity, while others questioned the usefulness of continuing with work on the topic.[4] After careful consideration, the Working Group deemed it appropriate that the Commission expedite its work on the topic and produce an outcome that is of practical value to the international community.

4. The Working Group, as discussed below, hereby recommends to the Commission: (a) that it adopt the 2013 report of the Working Group; and (b) that it adopt this report, which addresses additional issues raised by delegations to the Sixth Committee in 2013.

5. The 2013 report of the Working Group was generally well received in the Sixth Committee. Several delegations found it to be a valuable resource, particularly in relation to its examination and interpretation of the obligation in multilateral conventions and the Judgment of the International Court of Justice in *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*. Delegations also appreciated it for answering several questions raised during the work of the Commission on this topic. One delegation[5] queried whether any broad implications could be derived from the specific circumstances presented in that Judgment. Another delegation[6] contended that the report contained certain problematic conclusions, particularly because paragraph 28 of the report did not adequately reflect the position of States on draft article 13 of the draft articles on the topic "Expulsion of aliens" adopted by the Commission at its first reading in 2012. In light of these largely favourable reactions, the Working Group recommends that the Commission adopt the 2013 report of the Working Group as a report of the Commission on this topic.

6. The Working Group considered remaining issues that were not covered by its 2013 report but were subsequently raised in the Sixth Committee, namely the customary international law status of the obligation to extradite or prosecute; gaps in the existing conventional regime; the transfer of a suspect to an international or special court or tribunal as a potential third alternative to extradition or prosecution; the relationship between the obligation to extradite or prosecute and *erga omnes* obligations or *jus cogens* norms; and the continued relevance of the 2009 General Framework.[7]

7. The following summary addresses these remaining issues.

B. Conclusions of the Working Group on the remaining issues

1. The customary international law status of the obligation to extradite or prosecute

8. Some delegations to the Sixth Committee opined that there was no obligation to extradite or prosecute under customary international law, whereas others were of the view that the customary international law status of the obligation merited further consideration by the Commission.[8]

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[4] *Topical summary of the discussion held in the Sixth Committee of the General Assembly during its Sixty-eighth Session, prepared by the Secretariat* (A/CN.4/666), para. 64.

[5] The delegation of Israel.

[6] The delegation of the Czech Republic.

[7] The 2009 General Framework is found in *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 10* (A/64/10), para. 204.

[8] A/CN.4/666, para. 60.

9. It may be recalled that in 2011 the then Special Rapporteur Galicki, in his Fourth Report, proposed the following draft article:[9]

> **"Article 4**
>
> **International custom as a source of the obligation *aut dedere aut judicare***
>
> 1. Each State is obliged either to extradite or to prosecute an alleged offender if such an obligation is deriving from the customary norm of international law.
>
> 2. Such an obligation may derive, in particular, from customary norms of international law concerning [serious violations of international humanitarian law, genocide, crimes against humanity and war crimes].[10]
>
> 3. The obligation to extradite or prosecute shall derive from the peremptory norm of general international law accepted and recognized by the international community of States (*jus cogens*), either in the form of international treaty or international custom, criminalizing any one of acts listed in paragraph 2."

10. However, the draft article was not well received either in the Commission[11] or the Sixth Committee.[12] There was general disagreement with the conclusion that the customary nature of the obligation to extradite or prosecute could be inferred from the existence of customary rules proscribing specific international crimes.

11. Determining whether the obligation to extradite or prosecute has become or is becoming a rule of customary international law, or at least a regional customary law, may help indicate whether a draft article proposed by the Commission codifies or is progressive development of international law. However, since the Working Group has decided not to have the outcome of the Commission's work on this topic take the form of draft articles, it has found it unnecessary to come up with alternative formulas to the one proposed by Mr. Galicki.

12. The Working Group wishes to make clear that the foregoing should not be construed as implying that either the Working Group or the Commission as a whole has found that the obligation to extradite or prosecute has not become or is not yet crystallising into a rule of customary international law, be it a general or regional one.

13. When the Commission adopted the *Draft Code of Crimes against the Peace of Mankind* ("*Draft Code*") in 1996, the provision on the obligation to extradite or prosecute thereunder represented progressive development of international law, as explained in paragraph 4 of the 2013 report of the Working Group. Since the completion of the 1996 *Draft Code*, there may have been further developments in international law that reflect State practice and *opinio juris* in this respect.

14. The Working Group noted that in 2012 the International Court of Justice in *Belgium v. Senegal* ruled that it had no jurisdiction to entertain Belgium's claims relating to

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[9] A/CN.4/648, para. 95.

[10] The list of crimes and offences in the square brackets "seems to be still open and subject to further consideration and discussion". *Ibid.*, para. 96.

[11] *Official Records of* the *General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10), paras. 320–326.

[12] In particular, some States disagreed with the conclusion that the customary nature of the obligation to extradite or prosecute could necessarily be inferred from the existence of customary rules proscribing specific international crimes. *Topical summary of the discussion held in the Sixth Committee of the General Assembly during its Sixty-sixth Session, prepared by the Secretariat* (A/CN.4/650), para. 48. See also the positions of Argentina, in A/C.6/62/SR.22, para. 58 and the Russian Federation, in A/CN.4/599, para. 54, respectively.

Senegal's alleged breaches of obligations under customary international law because at the date of Belgium's filing of the Application the dispute between Belgium and Senegal did not relate to breaches of obligations under customary international law.[13] Thus, an opportunity has yet to arise for the Court to determine the customary international law status or otherwise of the obligation to extradite or prosecute.[14]

2. Gaps in the existing conventional regime and the "*third alternative*"

15. The 2013 report of the Working Group observed that there were important gaps in the present conventional regime governing the obligation to extradite or prosecute, notably in relation to most crimes against humanity, war crimes other than grave breaches, and war crimes in non-international armed conflict. The Working Group also noted that the Commission had placed on its long-term work programme in 2013 the topic of crimes against humanity, which would include as one element of a new treaty an obligation to extradite or prosecute for those crimes.[15] It further suggested that, in relation to genocide, the international cooperation regime could be strengthened beyond the one that exists under the 1948 *Convention on the Prevention and Punishment of the Crime of Genocide*.[16]

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[13] *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012*, p. 422, paras. 53–55, 122 (2), with Judge Abraham and Judge *ad hoc* Sur dissenting on this point (*ibid.*, Separate Opinion of Judge Abraham, paras. 3–20; Dissenting Opinion of Judge *ad hoc* Sur, para. 17).

[14] Judge Abraham and Judge *ad hoc* Sur concluded that the Court, if it had found jurisdiction, would not have upheld Belgium's claim of the existence of the customary international law obligation to prosecute or extradite. In his Separate Opinion, Judge Abraham considered there was insufficient evidence, based on State practice and *opinio juris*, of a customary obligation for States to prosecute before their domestic courts individuals suspected of war crimes or crimes against humanity on the basis of universal jurisdiction, even when limited to the case where the suspect was present in the territory of the forum State. (*ibid.*, Separate Opinion of Judge Abraham, paras. 21, 24–25, 31–39).

In his Dissenting Opinion, Judge *ad hoc* Sur said that despite the silence of the Court, or perhaps because of such silence, 'it seems clear that the existence of a customary obligation to prosecute or extradite, or even simply to prosecute, cannot be established in positive law' (*ibid.*, Dissenting Opinion of Judge *ad hoc* Sur, para. 18).

By contrast, the Separate Opinions of Judge Cançado Trindade (*ibid.*, Separate Opinion of Judge Cançado Trindade, para. 143) and of Judge Sebutinde (*ibid.*, Separate Opinion of Judge Sebutinde, paras. 41–42) both stressed that the Court only found that it had no jurisdiction to address the merits of the customary international law issues given the facts presented in the case.

In any case, any reference to the existence or non-existence of the customary law obligation in *Belgium v. Senegal* was to the obligation in the cases of crimes against humanity and war crimes in internal armed conflicts. It did not touch upon such obligation in the context of genocide, war crimes in international armed conflicts, or other crimes of international concern like acts of terrorism.

[15] *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10* (A/68/10), Annex B.

[16] *Ibid.*, Annex A, para. 20. A study by the Chatham House suggested that the Commission's future work on this topic should concentrate on drafting a treaty obligation to extradite or prosecute in respect of core international crimes and emulate the extradite-or-prosecute mechanism developed in Article 7 of the 1970 *Hague Convention for the Suppression of Unlawful Seizure of Aircraft* and incorporated in the 1984 *UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment* and, most recently, in the 2006 *International Convention for the Protection of All Persons from Enforced Disappearance*. See Miša Zgonec-Rožej and Joanne Foakes, "International criminals: Extradite or Prosecute?", Chatham House Briefing Paper, Doc. IL BP 2013/01, Jul. 2013.

16. Instead of drafting a set of model provisions to close the gaps in the existing conventional regime regarding the obligation to extradite or prosecute, the Working Group recalls that an obligation to extradite or prosecute for, *inter alia*, genocide, crimes against humanity and war crimes is already stipulated in article 9 of the 1996 *Draft Code*, which reads:

> "Without prejudice to the jurisdiction of an international criminal court, the State Party in the territory of which an individual alleged to have committed a crime set out in article 17 [genocide], 18 [crimes against humanity], 19 [crimes against United Nations and associated personnel] or 20 [war crimes] is found shall extradite or prosecute that individual."[17]

17. The Working Group also points out that the obligation to extradite or prosecute was developed in article 7 of the 1970 *Hague Convention for the Suppression of Unlawful Seizure of Aircraft*, which reads:

> "The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. ...."

18. The above provision, known as the "Hague formula", has served as a model for most contemporary conventions containing the obligation to extradite or prosecute,[18] including the UN Convention against Transnational Organized Crime and the UN Convention against Corruption which have been mentioned by several delegations in the Sixth Committee in 2013 as a possible model to close the gaps in the conventional regime. In addition, the Judgment of the International Court of Justice in *Belgium v. Senegal* is helpful in construing the Hague formula.[19] The Working Group recommends that States consider the Hague formula in undertaking to close any gaps in the existing conventional regime.

19. The Working Group further acknowledges that some States[20] have inquired about the link between the obligation to extradite or prosecute and the transfer of a suspect to an international or special court or tribunal, whereas other States[21] treat such a transfer differently from extradition. As pointed out in the 2013 report of the Working Group, the obligation to extradite or prosecute may be satisfied by surrendering the alleged offender to a competent international criminal tribunal.[22] A provision to this effect appears in article 11, paragraph 1, of the 2006 *International Convention for the Protection of All Persons from Enforced Disappearance*, which reads:

> "The State party in the territory under whose jurisdiction a person alleged to have committed [an act of genocide/a crime against humanity/a war crime] is found shall,

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[17] See also the Commission's commentary on this article in *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10* (A/51/10), chap. II.

[18] *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10* (A/68/10), Annex A, para. 16 and accompanying footnote 28.

[19] *Ibid.*, paras. 21–22.

[20] Chile, France, and Thailand.

[21] Canada and the United Kingdom of Great Britain and Northern Ireland.

[22] *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10* (A/68/10), Annex A, paras. 33–35. See also the Council of Europe, *Extradition, European Standards: Explanatory notes on the Council of Europe convention and protocol and minimum standards protecting persons subject to transnational criminal proceedings* (Council of Europe Publishing, Strasbourg, 2006), where it is stated that: "... In the era of international criminal tribunals, the principle [*aut dedere aut judicare*] may be interpreted *lato sensu* to include the duty of the state to transfer the person to the jurisdiction of an international organ, such as the International Criminal Court" (*ibid.*, p. 119, footnote omitted).

if it does not extradite that person or surrender him or her to another State in accordance with its international obligations or surrender him or her to a competent international criminal tribunal or any other competent court whose jurisdiction it has recognized, submit the case to its competent authorities for the purpose of prosecution."

20. Under such a provision, the obligation to extradite or prosecute may be satisfied by a "third alternative", which would consist of the State surrendering the alleged offender to a competent international criminal tribunal or a competent court whose jurisdiction the State concerned has recognized. The competent tribunal or court may take a form similar in nature to the Extraordinary African Chambers, set up within the Senegalese court system by an agreement dated 22 August 2012 between Senegal and the African Union, to try Mr. Habré in the wake of the Judgment in *Belgium v. Senegal*.[23] This kind of "internationalization" within a national court system is not unique. As a court established by the agreement between Senegal and the African Union, with the participation of national and foreign judges in these Chambers, the Extraordinary African Chambers follow the examples of the Extraordinary Chambers in the Courts of Cambodia, the Special Court for Sierra Leone and the Special Tribunal for Lebanon.

21. The above examples highlight the essential elements of a provision containing the obligation to extradite or prosecute, and may assist States in choosing the formula that they consider to be most appropriate for a particular context.

3. The priority between the obligation to prosecute and the obligation to extradite, and the scope of the obligation to prosecute

22. The Working Group takes note of the suggestion made by one delegation[24] to the Sixth Committee in 2013 to analyze these two aspects of the topic. It also notes the suggestions of other delegations[25] that the Commission establish a general framework of extraditable offences or guiding principles on the implementation of the obligation to extradite or prosecute. It wishes to draw attention to the Secretariat Survey (2010) and the 2013 report of the Working Group, particularly paragraphs 13–18, which addressed these issues.

23. To recapitulate, beyond the basic common features, provisions containing the obligation to extradite or prosecute in multilateral conventions vary considerably in their formulation, content and scope. This is particularly so in terms of the conditions imposed on States with respect to extradition and prosecution and the relationship between these two courses of action. Although the relationship between the obligation to extradite and the obligation to prosecute is not identical, the relevant provisions seem to fall into two main categories; namely, (a) those clauses pursuant to which the obligation to prosecute is only triggered by a refusal to surrender the alleged offender following a request for extradition; and (b) those imposing an obligation to prosecute *ipso facto* when the alleged offender is present in the territory of the State, which the latter may be liberated from by granting extradition.

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[23] The Extraordinary African Chambers have jurisdiction to try the person or persons most responsible for international crimes committed in Chad between 7 June 1982 and 1 December 1990. The Trial Chamber and the Appeals Chamber are each composed of two Senegalese judges and one non-Senegalese judge, who presides over the proceedings. The Trial Chamber and the Appeals Chamber are each composed of two Senegalese judges and one non-Senegalese judge, who preside over the proceedings, see *Statute of the Extraordinary African Chambers*, articles 3 and 11, *International Legal Materials*, vol. 52, (2013), pp. 1020–1036).

[24] Mexico.

[25] Cuba and Belarus, respectively.

24. Instruments containing clauses in the first category impose on States Parties (at least those that do not have a special link with the offence) an obligation to prosecute only when extradition has been requested and not granted, as opposed to an obligation *ipso facto* to prosecute the alleged offender present in their territory. They recognize the possibility that a State may refuse to grant a request for extradition of an individual on grounds stipulated either in the instrument or in national legislation. However, in the event of refusal of extradition, the State is obliged to prosecute the individual. In other words, these instruments primarily focus on the option of extradition and provide the alternative of prosecution as a safeguard against impunity.[26] In addition, instruments in this category may adopt very different mechanisms for the punishment of offenders, which may affect the interaction between extradition and prosecution. In some instances, there are detailed provisions concerning the prosecution of offences that are the subject of the instrument, while in other cases, the process of extradition is regulated in greater detail. The 1929 *International Convention for the Suppression of Counterfeiting Currency* and subsequent conventions inspired by it[27] belong to this first category.[28] Multilateral conventions on extradition also fall into this category.[29]

25. Clauses in the second category impose upon States an obligation to prosecute *ipso facto* in that it arises as soon as the presence of the alleged offender in the territory of the State concerned is ascertained, regardless of any request for extradition. Only in the event that a request for extradition is made does the State concerned have the discretion to choose between extradition and prosecution.[30] The clearest example of such clauses is the relevant

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[26] Secretariat Survey (2010), para. 132. In effect, these conventions appear to follow what was originally foreseen by Hugo Grotius when he referred to the principle *aut dedere aut punire*. Hugo Grotius, *De Jure Belli ac Pacis*, Book II, chapter XXI, section IV (English translation by Francis W. Kelsey, Oxford/London, Clarendon Press/Humphrey Milford, 1925), pp. 527–529, at p. 527.

[27] E.g., the 1936 *Convention for the Suppression of the Illicit Traffic in Dangerous Drugs*; the 1937 *Convention for the Prevention and Punishment of Terrorism*; the 1950 *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*; the 1961 *Single Convention on Narcotic Drugs*; and the 1971 *Convention on Psychotropic Substances*. See also Secretariat Survey (2010), para. 29.

[28] The overall structure of the mechanism for the punishment of offenders in these conventions is based on the idea that the State in whose territory the crime was committed will request the extradition of the offender who has fled to another State and that extradition should, in principle, be granted. These conventions, however, recognise that States may be unable to extradite in some cases (most notably when the individual is their national or when they have granted asylum to him) and provide for the obligation to prosecute as an alternative. Secretariat Survey (2010), para. 133 and fn. 327 citing Marc Henzelin, *Le principe de l'universalité en droit penal international. Droit et obligation pour les Etats de poursuivre et de juger selon le principe de l'universalité* (Basel/Geneva/Munich/Brussels, Helbing&Lichtenhahn/Faculté de droit de Genève/Bruylant, 2000), p. 286, who qualifies the system as *primo dedere secundo prosequi*.

[29] E.g., the 1981 *Inter-American Convention on Extradition*; the 1957 *European Convention on Extradition*; the 1961 *General Convention on Judicial Cooperation* (*Convention générale de coopération en matière de justice*); the 1994 *Economic Community of West African States (ECOWAS) Convention on Extradition*; and the *London Scheme for Extradition within the Commonwealth*. These conventions are based on the general undertaking by States Parties to surrender to one another all persons against whom the competent authorities of the requesting Party are proceeding for an offence or who are wanted for the carrying out of a sentence or detention order. However, the obligation to extradite is subject to a number of conditions and exceptions, including when the request involves the national of the requested State. When extradition is refused, the conventions impose an alternative obligation to prosecute the alleged offender as a mechanism to avoid impunity. See also Secretariat Survey (2010), para. 134.

[30] Secretariat Survey (2010), para.127, and fn. 307. Those opining that the accused must be present in the territory of the State concerned as a precondition of the assertion of universal jurisdiction include

common article of the 1949 *Geneva Conventions*, which provides that each State party "shall bring" persons alleged to have committed, or to have ordered to be committed, grave breaches to those Conventions, regardless of their nationality, before its own courts, but "may also, if it prefers", hand such persons over for trial to another State party concerned.[31] As for the Hague formula, its text does not unequivocally resolve the question of whether the obligation to prosecute arises *ipso facto* or only once a request for extradition is submitted and not granted.[32] In this regard, the findings of the Committee against Torture and the International Court of Justice in *Belgium v. Senegal*, in relation to a similar provision contained in article 7 of the 1984 *Convention against Torture*,[33] are instructive. The Committee against Torture has explained that:

> "... the obligation to prosecute the alleged perpetrator of acts of torture does not depend on the prior existence of a request for his extradition. The alternative available to the State party under article 7 of the Convention exists only when a request for extradition has been made and puts the State party in the position of having to choose between (a) proceeding with extradition or (b) submitting the case to its own judicial authorities for the institution of criminal proceedings, the objective of the provision being to prevent any act of torture from going unpunished."[34]

Judges Higgins, Kooijmans and Buergenthal (Joint Separate Opinion in *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), I.C.J .Reports 2002*, para 57). See also Separate Opinion of Judge Guillaume., *ibid.*, para 9 and Gilbert Guillaume, «Terrorisme et droit international», *Recueil des cours de l'Académie de droit international*, vol. 215, 1990, pp. 368–369. However, Marc Henzelin (*supra* note 28, p 354) argues that the presence of the alleged offender in the territory of the State is not required for prosecution under the relevant provision of the 1949 *Geneva Conventions*.

[31] While this provision appears to give a certain priority to prosecution by the custodial State, it also recognises that this State has the discretion to opt for extradition, provided that the requesting State has made out a *prima facie* case. Secretariat Survey (2010), para. 128, citing Declan Costello, "International Terrorism and the Development of the Principle *Aut Dedere Aut Judicare*", *The Journal of International Law and Economics*, vol. 10, 1975, p. 486; M. Cherif Bassiouni and Edward M. Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law* (Dordrecht/Boston/London, Martinus Nijhoff, 1995), p. 15; and Christian Maierhöfer, *"Aut dedere – aut iudicare". Herkunft, Rechtsgrundlagen und Inhalt des völkerrechtlichen Gebotes zur Strafverfolgung oder Auslieferung* (Berlin, Duncker & Humblot, 2006), pp. 75–76. Authors who emphasize the priority attributed to prosecution in the 1949 Geneva Conventions are said to include Luigi Condorelli, "Il sistemadella repression dei crimini di Guerra nelle Convenzioni di Ginevra del 1949 e nel primo protocollo addizionale del 1977", in P. Lamberti Zanardi & G. Venturini, eds., *Crimini di guerra e competenza delle giurisdizioni nazionali: Atti del Convegno, Milano, 15–17 maggio 1997* (Milan, Giuffrè, 1998), pp. 35–36; and Henzelin, *supra* p 353 (who qualifies the model of the 1949 Geneva Conventions as *primo prosequi secundo dedere*). *C.f.* also art. 88 (2) of *Additional Protocol I* to the 1949 *Geneva Conventions*, which calls on States Parties to "give due consideration to the request of the State in whose territory the alleged offence has occurred", thus implying that prosecution by the latter State would be preferable.

[32] Art. 7 of the 1970 *Hague Convention for the Suppression of Unlawful Seizure of Aircraft* provides that "[t]he Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged ... to submit the case to its competent authorities for the purpose of prosecution".

[33] Art. 7 states: "The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution."

[34] *Guengueng et al. v. Senegal*, Merits, Decision of the Committee Against Torture under Art. 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 36th Sess., Doc CAT/C/36/D/181/2001 dated 19 May 2006, para. 9.7.

26. Likewise, in *Belgium v. Senegal*, the International Court of Justice considered article 7 (1) of the *Convention against Torture* as requiring:

> "the State concerned to submit the case to its competent authorities for the purpose of prosecution, irrespective of the existence of a prior request for the extradition of the suspect. That is why Article 6, paragraph 2, obliges the State to make a preliminary inquiry immediately from the time that the suspect is present in its territory. The obligation to submit the case to the competent authorities, under Article 7, paragraph 1, may or may not result in the institution of proceedings, in the light of the evidence before them, relating to the charges against the suspect.
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> However, if the State in whose territory the suspect is present has received a request for extradition in any of the cases envisaged in the provisions of the Convention, it can relieve itself of its obligation to prosecute by acceding to that request. ...."[35]

27. Accordingly, it follows that the choice between extradition and submission for prosecution under the Convention did not mean that the two alternatives enjoyed the same weight. Extradition was an option offered to the State by the Convention while prosecution was an obligation under the Convention, the violation of which was a wrongful act resulting in State responsibility.[36]

28. With respect to the Commission's 1996 *Draft Code*, article 9 provides that the State Party in whose territory an individual alleged to have committed these crimes is found "shall extradite or prosecute that individual". The commentary to article 9 clarifies that the obligation to prosecute arises independently from any request for extradition.[37]

29. The scope of the obligation to prosecute has already been elaborated in paragraphs 29–31 of the 2013 report of the Working Group and need not be repeated here.[38]

4. The relationship of the obligation to extradite or prosecute with *erga omnes* obligations or *jus cogens* norms

30. The Working Group notes that one delegation[39] to the Sixth Committee has raised the issue of the impact of the *aut dedere aut judicare* principle on international responsibility when it relates to *erga omnes* obligations or *jus cogens* norms, such as the prohibition of torture. The delegation suggested an analysis of the following questions: (a) in respect of whom the obligation exists; (b) who can request extradition; and (c) who has a legal interest in invoking the international responsibility of a State for being in breach of its "obligation to prosecute or extradite".

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[35] *I.C.J. Reports 2012*, paras. 94–95.

[36] *Ibid.*, para. 95.

[37] The custodial State has an obligation "to take action to ensure that such an individual is prosecuted either by the national authorities of that State or by another State which indicated that it was willing to prosecute the case by requesting extradition". Para. 3 of the commentary to art. 9, *Yearbook of the International Law Commission 1996*, vol. II (Part Two), p. 31. Reference should also be made to the commentary to art. 8 (whereby each State party "shall take such measures as may be necessary to establish its jurisdiction" over the crimes set out in the Draft Code "irrespective of where or by whom those crimes were committed").

[38] The Hague formula emulated in the *Convention against Torture*, which was the subject matter of the dispute in *Belgium v. Senegal*, should, strictly speaking, be described as "*aut dedere aut persequi*". See Secretariat Survey (2010), para. 146, citing Gilbert Guillaume, «Terrorisme et droit international», *supra* note 30, pp. 354 and 368; Marc Henzelin, *supra* note 28, pp. 302 and 304–306.

[39] Mexico.

31. Several members of the Working Group pointed out that this area was likely to concern the interpretation of conventional norms. The statements of the International Court of Justice in this regard in *Belgium v. Senegal* must be read within the specific context of that particular case. There, the Court interpreted the object and purpose of the *Convention against Torture* as giving rise to "obligations *erga omnes partes*", whereby each State Party had a "common interest" in compliance with such obligations and, consequently, each State Party was entitled to make a claim concerning the cessation of an alleged breach by another State Party.[40] The issue of *jus cogens* was not central to this point. In the understanding of the Working Group, the Court was saying that insofar as States were parties to the *Convention against Torture*, they had a common interest to prevent acts of torture and to ensure that, if they occurred, those responsible did not enjoy impunity.

32. Other treaties, even if they may not involve *jus cogens* norms, may lead to *erga omnes* obligations as well. In other words, all States Parties may have a legal interest in invoking the international responsibility of a State Party for being in breach of its obligation to extradite or prosecute.

33. The State that can request extradition normally will be a State Party to the relevant convention or have a reciprocal extradition undertaking/arrangement with the requested State, having jurisdiction over the offence, being willing and able to prosecute the alleged offender, and respecting applicable international norms protecting the human rights of the accused.[41]

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[40] Judgment, paras. 67–70. See also Separate Opinion of Judge Cançado Trindade, paras. 104–108, and Judge Donoghue (Declaration), paras. 9–17. C.f. Dissenting Opinion of Judge Xue, paras. 2–23, and Dissenting Opinion of Judge *ad hoc* Sur, paras. 13, 19–20. Cf. also the Separate Opinion of Judge Skotnikov, paras. 9–22.

[41] See, e.g., Council of Europe, note 21 above, Chap. 4: Material human rights guarantees as limitations to extradition; Danai Azaria, *Code of Minimum Standards of Protection to Individuals Involved in Transnational Proceedings*, Report to the Committee of Experts on Transnational Criminal Justice, European Committee on Crime Problems, Council of Europe, PC-TJ/Docs 2005/PC-TJ (2005) 07 E. Azaria], Strasbourg, 16 Sept. 2005.

5. Other considerations

34. The Working Group observed that the 2009 General Framework[42] continued to be mentioned in the Sixth Committee[43] as relevant to the Commission's work on the topic.

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[42] For ease of reference, the 2009 General Framework is reproduced here. It reads as follows:

List of questions/issues to be addressed

(a) The legal bases of the obligation to extradite or prosecute

(i) The obligation to extradite or prosecute and the duty to cooperate in the fight against impunity;

(ii) The obligation to extradite or prosecute in existing treaties: Typology of treaty provisions; differences and similarities between those provisions, and their evolution (cf. conventions on terrorism);

(iii) Whether and to what extent the obligation to extradite or prosecute has a basis in customary international law;*

(iv) Whether the obligation to extradite or prosecute is inextricably linked with certain particular "customary crimes" (e.g. piracy);*

(v) Whether regional principles relating to the obligation to extradite or prosecute may be identified.*

(b) The material scope of the obligation to extradite or prosecute

Identification of the categories of crimes (e.g. crimes under international law; crimes against the peace and security of mankind; crimes of international concern; other serious crimes) covered by the obligation to extradite or prosecute according to conventional and/or customary international law:

(i) Whether the recognition of an offence as an international crime is a sufficient basis for the existence of an obligation to extradite or prosecute under customary international law;*

(ii) If not, what is/are the distinctive criterion/criteria? Relevance of the *jus cogens* character of a rule criminalizing certain conduct?*

(iii) Whether and to what extent the obligation also exists in relation to crimes under domestic laws?

(c) The content of the obligation to extradite or prosecute

(i) Definition of the two elements; meaning of the obligation to prosecute; steps that need to be taken in order for prosecution to be considered "sufficient"; question of timeliness of prosecution;

(ii) Whether the order of the two elements matters;

(iii) Whether one element has priority over the other – power of free appreciation (*pouvoirdiscrétionnaire*) of the requested State?

(d) Relationship between the obligation to extradite or prosecute and other principles

(i) The obligation to extradite or prosecute and the principle of universal jurisdiction (does one necessarily imply the other?);

(ii) The obligation to extradite or prosecute and the general question of "titles" to exercise jurisdiction (territoriality, nationality);

(iii) The obligation to extradite or prosecute and the principles of *nullumcrimen sine lege*and *nullapoena sine lege*;**

(iv) The obligation to extradite or prosecute and the principle *non bis in idem* (double jeopardy);**

(v) The obligation to extradite or prosecute and the principle of non-extradition of nationals;**

(vi) What happens in case of conflicting principles (e.g.: non-extradition of nationals *v.* no indictment in national law? obstacles to prosecute *v.* risks for the accused to be tortured or lack of due process in the State to which extradition is envisaged?); constitutional limitations.**

35. The 2009 General Framework raised several issues in relation to the obligation to extradite or prosecute that were covered in the 2013 report of the Working Group, but some issues were not, namely: the obligation's relationship with the principles of *nullum crimen sine lege* and *nulla poena sine lege* and the principle *non bis in idem* (double jeopardy); the implications of a conflict between various principles (e.g. non-extradition of nationals *versus* no indictment in national law; obstacles to prosecution *versus* risks for the accused to be tortured or lack of due process in the State to which extradition is envisaged); constitutional limitations; circumstances excluding the operation of the obligation (e.g. political offences or political nature of a request for extradition; emergency situations; immunities); the problem of multiple requests for extradition; guarantees in case of extradition; and other issues related to extradition in general.

36. States should be reminded that the United Nations Office on Drugs and Crime has drafted the 2004 *Model Law on Extradition*, which addresses most of these issues.[44] The

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(e) Conditions for the triggering of the obligation to extradite or prosecute

(i) Presence of the alleged offender in the territory of the State;

(ii) State's jurisdiction over the crime concerned;

(iii) Existence of a request for extradition (degree of formalism required); Relations with the right to expel foreigners;

(iv) Existence/consequences of a previous request for extradition that had been rejected;

(v) Standard of proof (to what extent must the request for extradition be substantiated);

(vi) Existence of circumstances that might exclude the operation of the obligation (e.g. political offences or political nature of a request for extradition; emergency situations; immunities).

(f) The implementation of the obligation to extradite or prosecute

(i) Respective roles of the judiciary and the executive;

(ii) How to reconcile the obligation to extradite or prosecute with the discretion of the prosecuting authorities;

(iii) Whether the availability of evidence affects the operation of the obligation;

(iv) How to deal with multiple requests for extradition;

(v) Guarantees in case of extradition;

(vi) Whether the alleged offender should be kept in custody awaiting a decision on his or her extradition or prosecution; or possibilities of other restrictions to freedom?;

(vii) Control of the implementation of the obligation;

(viii) Consequences of non-compliance with the obligation to extradite or prosecute.

(g) The relationship between the obligation to extradite or prosecute and the surrender of the alleged offender to a competent international criminal tribunal (the "third alternative")

To what extent the "third" alternative has an impact on the other two.

[*It might be that a final determination on these questions will only be possible at a later stage, in particular after a careful analysis of the scope and content of the obligation to extradite or prosecute under existing treaty regimes. It might also be advisable to examine the customary nature of the obligation in relation to specific crimes.

** This issue might need to be addressed also in relation to the implementation of the obligation to extradite or prosecute (f).]

[43] At the Sixth Committee debate in 2012, Austria, the Netherlands, and Vietnam considered the 2009 General Framework a valuable supplement to the work of the Commission. In the Netherlands' opinion, the work of the Commission should eventually result in presenting draft articles based on that General Framework. At the Sixth Committee debate in 2013, Austria reiterated the usefulness of the 2009 General Framework to the work of the present Working Group.

[44] Available at http://www.unodc.org/pdf/model_law_extradition.pdf. See also Revised Manuals on the Model Treaty on Extradition and on the Model Treaty on Extradition and on the Model Treaty on Mutual Assistance in Criminal Matters, available at: http://www.unodc.org/pdf/model_treaty_extradition_revised_manual.pdf (visited on 3 June 2014).

Secretariat Survey (2010) has also explained that multilateral conventions on extradition usually stipulate the conditions applicable to the extradition process.[45] Nearly all such conventions subject extradition to the conditions provided by the law of the requested State. There may be grounds of refusal that are connected to the offence (e.g. the expiry of the statute of limitations, the failure to satisfy requirements of double criminality, specialty, *nullum crimen sine lege* and *nulla poena sine lege* or *non bis in idem*, or the fact that the crime is subject to death penalty in the requesting State) or not so connected (e.g. the granting of political asylum to the individual or the existence of humanitarian reasons to deny extradition). The degree of specificity of the conditions applicable to extradition varies depending on factors such as the specific concerns expressed during the course of negotiations (e.g. non-extradition of nationals, application or non-application of the political exception or fiscal exception clauses), the particular nature of the offence (e.g. the risk of refusal of extradition based on the political character of the offence appears to be more acute with respect to certain crimes), and drafting changes to take into account problems that may have been overlooked in the past (e.g. the possible triviality of the request for extradition or the protection of the rights of the alleged offender) or to take into account new developments or a changed environment.[46]

37. The relationship between the obligation to extradite or prosecute and other principles as enumerated in the 2009 General Framework belongs not only to international law, but also to the constitutional law and domestic law of the States concerned. Whatever the conditions under domestic law or a treaty pertaining to extradition, they must not be applied in bad faith, with the effect of shielding an alleged offender from prosecution in or extradition to an appropriate criminal jurisdiction. In the case of core crimes, the object and purpose of the relevant domestic law and/or applicable treaty is to ensure that perpetrators of such crimes do not enjoy impunity, implying that such crimes can never be considered political offences and be exempted from extradition.[47]

38. After exhaustive deliberations in the Working Group in the past three years, and in light of the discussion in its 2013 report and the present report, the Working Group considers that there are no further aspects of the 2009 General Framework that require analysis by the Commission in the context of this topic.

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[45] Secretariat Survey (2010), para. 139.

[46] *Ibid.*, para. 142.

[47] A good example is art. 1 of the Additional Protocol, dated 15 Oct. 1975, to the 1957 European Convention on Extradition, which reads:

> "For the application of Article 3 [on political offences] of the Convention, political offences shall not be considered to include the following:
>
> (a) the crimes against humanity specified in the Convention on the Prevention and Punishment of the Crime of Genocide adopted on 9 December 1948 by the General Assembly of the United Nations;
>
> (b) the violations specified in Article 50 of the 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Article 51 of the 1949 Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked members of Armed Forces at Sea, Article 130 of the 1949 Geneva Convention relative to the Treatment of Prisoners of War and Article 147 of the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War;
>
> (c) any comparable violations of the laws of war having effect at the time when this Protocol enters into force and of customs of war existing at that time, which are not already provided for in the above-mentioned provisions of the Geneva Conventions" (*Council of Europe Treaty Series No. 086)*.

C. Recommendations

39. The present report exhausts all the issues remaining to be analyzed in relation to this topic. Therefore, the Working Group recommends that the Commission:

(a) Adopt the 2013 report of the Working Group and the present final report of the Working Group, which, in the view of the Commission, provide useful guidance for States; and

(b) Conclude its consideration of the topic "Obligation to extradite or prosecute (*aut dedere aut judicare*)".